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## Pluralism in International Criminal Law

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### ***published in***

Leiden Journal of International law  
2012

### ***DOI (link to publisher)***

[10.1017/S0922156512000477](https://doi.org/10.1017/S0922156512000477)

### ***document version***

Early version, also known as pre-print

[Link to publication in VU Research Portal](#)

### ***citation for published version (APA)***

van Sliedregt, E. (2012). Pluralism in International Criminal Law. *Leiden Journal of International law*, 25(4), 847-855. <https://doi.org/10.1017/S0922156512000477>

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## Pluralism in International Criminal Law

*Elies van Sliedregt*

Fragmentation of international law is a phenomenon that has been discussed ever since the ILC in 2000 decided to add to its programme of work the topic 'Risks ensuing from the fragmentation of international law'.<sup>1</sup> Koskeniemi, in a paper published in this Journal, was one of the first to address fragmentation in legal literature.<sup>2</sup> In 2006, he finalized a voluminous Report on 'Fragmentation of International Law', providing for means and ways to cope with fragmentation.<sup>3</sup>

The proliferation of international courts and tribunals sparked this debate over fragmentation.<sup>4</sup> The development of a specialist regime of international law was perceived as posing a risk to the coherence and homogeneity of international law. Much of the anxiety over fragmentation stems from the collision between the ICJ and the ICTY over the 'overall control-test' in *Tadic* where the ICTY departed from settled ICJ law on attribution of liability and on qualification of the nature of an armed conflict (employing a standard of 'effective control').<sup>5</sup> The fact that the ICTY had earlier referred to itself as a 'self-contained' system<sup>6</sup>, fuelled these concerns over fragmentation.

At the same time, the anxiety over fragmentation has been trivialized. Koskeniemi and Leino point out that,

[i]nternational lawyers have always had to cope with the absence of a single source of normative validity, it may seem paradoxical that *they* should now feel anxiety about competing normative orders.<sup>7</sup>

Moreover, Simma in his keynote speech to the ESIL conference in 2008 expressed the view that the dangers of fragmentation are overstated. In his view, the emergence of international courts and tribunals does not pose challenges to the coherence of the international legal system since international judges are aware of the responsibility they bear for a coherent construction of international law.<sup>8</sup>

Twenty years since the establishment of the ICTY, the fragmentation/heterogeneity debate has entered a new phase. With a well-

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<sup>1</sup> Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), Chapter IX.A.1, para 729.

<sup>2</sup> M. Koskeniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *LJIL* 553 (2002).

<sup>3</sup> ILC, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, A/CN.4/L.682.

<sup>4</sup> See for an overview C. Stahn and L.J. van den Herik, 'Fragmentation, Diversification and '3D' legal pluralism: International Criminal Law as the Jack-in-the-Box?', in: L.J. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, (Martinus Nijhof, 2012) (forthcoming).

<sup>5</sup> *Prosecutor v. Tadić*, Judgement, IT-94-1-A, 15 July 1999.

<sup>6</sup> *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para 11.

<sup>7</sup> Koskeniemi & Leino, *supra* n. 2, at 558.

<sup>8</sup> Keynote Speech at the opening Session of the Biennial Conference of the European Society of International Law in Heidelberg on 4 September 2008, published as B. Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *EJIL* 265 (2008).

developed body of *ad hoc* Tribunal case law, an emerging body of case law at the ICC, hybrid systems like the Cambodia Tribunal, and more and more domestic prosecutions, pluralism has become an issue *within* the branch of ICL. While there are those who express concern over heterogeneity in ICL, recent scholarship acknowledges ICL's pluralistic nature and, instead of striving for unity, calls for ways of managing pluralism.<sup>9</sup> In a recent paper on pluralism in international criminal law, Alexander Greenawalt argues that the search for consistency and uniformity is misguided.<sup>10</sup> He acknowledges that ICL "operates in an irreducibly pluralistic environment" and that the law applicable to international crimes "should not be the same in all cases".<sup>11</sup>

## Heterogeneity

International criminal courts create distinct legal spaces. They each have their own Statute, Rules of Procedure and Evidence, and specific context in which they operate. Stahn and Van den Herik distinguish three models of international criminal justice: *ad hoc* justice, hybrid courts and the statutory regime of the Rome.<sup>12</sup> Just like the ICTY in *Tadic* compartmentalized the law on attribution and the determination of armed conflicts by adopting its 'own' (overall) control- test, international criminal justice systems compartmentalize ICL by creating separate legal regimes. The ICC most prominently features as a separate legal system. This is due to its institutional layout, in particular its approach to sources of law, but also to its legal culture.

Unlike article 38 of the ICJ Statute, Article 21 of the ICC Statute creates a hierarchy of sources.<sup>13</sup> The Statute, the Elements of Crime and the Rules of Procedure and Evidence are the primary sources. Applicable treaties and the principles and rules of international law come second. General principles derived from national law come third. Customary international law is not specifically mentioned in Article 21 but it may be applied under the heading 'rules of international law' in Article 21(1)(b).<sup>14</sup>

Article 21(2) authorizes the ICC to apply principles and rules of law as interpreted in *its* previous decisions. While this text clearly applies to case law of the Court it cannot be taken to mean that – *a contrario* – Article 21(2) prohibits the importation of principles derived from the case law of other international courts.<sup>15</sup> Yet, the ICC, by referring to the provisions of its Statute, can justifiably ignore the precedents of these courts.<sup>16</sup> Article 21 – at least on paper – limits the room for judicial development.<sup>17</sup> It is the hierarchical position of written, statutory law and the position on precedents, that limits an inter-court judicial dialogue and cross-

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<sup>9</sup> Stahn and Van den Herik, *supra* footnote 4.

<sup>10</sup> A.K.A. Greenawalt, 'The Pluralism of International Criminal Law', 86 *Indiana Law Journal*, 1063 (2011), - papers.ssrn.com, 1-66.

<sup>11</sup> *Ibidem*, at 5.

<sup>12</sup> Stahn and Van den Herik, *supra* footnote 4, at 4.

<sup>13</sup> See G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC', in C. Stahn and G.K. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, (2009), 285-304

<sup>14</sup> W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 391.

<sup>15</sup> Schabas, *Commentary*, at 396.

<sup>16</sup> V. Nehrlich, 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC', in C. Stahn and G.K. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Brill, 2009), 305-325; See also Bitti, *supra* footnote 14, at 295-304.

<sup>17</sup> D. Hunt, 'The International Criminal Court: High Hopes, "creative Ambiguity" and an Unfortunate Mistrust in International Judges' 2 *JICJ* (2004), 56-70

fertilization. According to Cryer Article 21 contributes to the fragmentation of ICL.<sup>18</sup>

It is also the ICC's culture that betrays *Alleingang*. There has been resistance at the Court to apply principles drawn from *ad hoc* Tribunals' law, even when there was no provision in the Statute requiring a departure from ICTY/R precedents. Examples concern procedural and substantive law. With regard to the former we can refer to the debate on 'witness proofing'.<sup>19</sup> With regard to the latter we can point to the 'control of the act/crime' theory of liability.<sup>20</sup> Both developments illustrate the Court's desire to move away from ICTY/R legacy and to forge its own path. The ICC is – to use Simma's wording – a separate epistemic community of highly specialized lawyers who, as if in a laboratory, seek to improve and further develop ICL.<sup>21</sup> This can be regarded as a process of emancipation, which results in creating something close to a self-contained regime.

Heterogeneity in ICL is further reinforced by domestic courts when acting as law-enforcers of ICL whether it is on the basis of universal jurisdiction, pursuant to the ICC's complementarity-regime, or by operating through classical principles of jurisdiction, such as territoriality and nationality. Domestic courts may look to international jurisprudence for guidance but they are not obliged to apply law emanating from international courts or tribunals. While complementarity and universal jurisdiction may prompt national jurisdictions to align to, or even incorporate the (exact) definitions of international crimes, the general part of criminal law and sentencing is generally regarded as belonging to the domestic domain.<sup>22</sup> It is here that we can expect divergence.<sup>23</sup> Indeed, ICL at the national level constitutes a patchwork of norms; it is as diverse as the number of jurisdictions that act as law-enforcers. Domestic law multiplies and reinforces what is already a heterogeneous legal order.

## Legal Pluralism

When discussing heterogeneity in ICL, pluralism should be favoured as a term over fragmentation. Fragmentation has a negative connotation.<sup>24</sup> Heterogeneity in ICL is a reality and by recognizing the pluralist nature of ICL one can think of how to manage it rather than how to counter it. Legal pluralism can even be regarded an asset, a strength. As Burke-White makes clear,

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<sup>18</sup> R. Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the politics of Sources' 12 *New Criminal Law Review* (2009), at 394.

<sup>19</sup> *Prosecutor v. Lubanga*, Witness proofing in Decision regarding the Practices used to Prepare and Familiarise Witnesses for Giving testimony at Trial, 01/04-01/06-1049, Decision on the Practices of Witness Familiarisation and Witness Proofing, 30 November 2007, para. 44. See R. Karemaker, B.D. Taylor and T.W. Pittman, 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence', 21 *LJIL* (2008) 683- 698; K. Ambos, 'Witness Proofing' before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman' 21 *LJIL*, (2008), 911-916.

<sup>20</sup> Decision on the Confirmation of Charges, *Lubanga*, (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007; *Katanga and Ngudjolo Chui*, (ICC-01/04-01/07), Decision on the Confirmation of Charges, 30 September 2008. See E. van Sliedregt, *Individual Criminal Responsibility in International Law*, (2012), 83-89.

<sup>21</sup> Simma, *supra* footnote 8, at 276.

<sup>22</sup> Greenawapt, *supra* footnote 11, at 6; Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review*, at 254.

<sup>23</sup> One such example is the *Frans van Anraat* case in the Netherlands where it was held that 'genocidal intent' under Dutch law encompasses *voorwaardelijk opzet* or *dolus eventualis*. This is broader than the international standard, which requires knowledge.

<sup>24</sup> Simma, *supra* footnote 8, at 269-270.

Instead of being undermined by fragmentation, the rules of, the institutions, and practices of the international legal order can be strengthened by the emergence of an international legal pluralism.<sup>25</sup>

For pluralism to strengthen the international criminal justice order, courts need to engage in a judicial dialogue rather than in *Alleingang*.<sup>26</sup> Pauwelyn's metaphor of a universe of inter-connected islands comes to mind when viewing pluralism in ICL.<sup>27</sup>

Griffiths in 1986 defined pluralism as, "[t]hat state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs".<sup>28</sup> The debate on legal pluralism originates in the field of anthropology and law, where pluralism was discussed in association with colonialism.<sup>29</sup> Pluralism was a phenomenon relating to legal and quasi-legal regimes in the post-colonial society where different bodies of (quasi-) law were applied to different groups of the population. With the proliferation of transnational and international legal regimes, pluralism has become a phenomenon that belongs to the transnational-regional and global legal context.<sup>30</sup>

Pluralism connotes overlapping, not necessarily conflicting, legal regimes. In the area of ICL, it confronts both international and domestic judges. When the latter act as international law-enforcers they may have to answer the question of, for instance, which law to apply when interpreting the definition of crimes against humanity: ICC law or ICTY law? International judges encounter legal pluralism as long as they operate in a 'state of connectedness' and see themselves as part of a larger system of international criminal justice. A typical question of legal pluralism (and judicial dialogue) could be: can ICTY law on Joint Criminal Enterprise (JCE) be relied upon when interpreting Article 25(3) of the ICC Statute?

## Universality

Pluralism does not exclude universality. To the contrary, pluralism implies universality and a certain degree of 'commonness'. In pluralism-literature, different forms of universality are recognized. Universality can be found in a common core of norms that are universal in application. Universality can go further and foster a belief in universal values (bordering on religious belief).<sup>31</sup> Either way - universality in application or universal in value - with a core of universal norms, pluralism takes the shape of legal systems gravitating around a common core, like planets circling around the sun. Universality can also be a narrative; an antidote to heterogeneity and an attempt to erase normative differences.<sup>32</sup> This is where universality prompts legal systems to connect and engage in judicial dialogue. Here the island-metaphor comes to mind. Pluralism is confined by a shared belief in functioning within a broader structure or system of law, like island belonging to one and the same Archipelago.

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<sup>25</sup> See W.W. Burke-White, 'International Legal Pluralism', in 25 *Michigan J. Int'l L* 963 (2003-2004), at 963-964.

<sup>26</sup> See C.H. Koch Jr, 'Judicial Dialogue for Legal Multiculturalism', 25 *Michigan J Int'l L* 929 (2004).

<sup>27</sup> J. Pauwelyn, Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands, 25 *Michigan J Int'l L* 903 (2004).

<sup>28</sup> J. Griffiths, 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism* 1 (1986).

<sup>29</sup> See for instance S.E. Merry, 'Legal Pluralism', 22 *Law & Society Review* 869 (1988).

<sup>30</sup> P.S. Berman, 'Global Legal Pluralism', 80 *Southern California Law Review*, 1155 (2006-2007).

<sup>31</sup> H.J. Berman, 'World Law', 18 *Fordham Int'l L. J.* 1617 (1995).

<sup>32</sup> *Ibidem*, at 1189.

Simma discerns three levels of universality in international law.<sup>33</sup> The first goes to the universality of international norms. This 'classic' understanding of universality means that there exists on the global scale an international law which is valid for and binding on all states. A second – wider - level of universality goes to the coherence of the international justice system. Here concerns of predictability and legal certainty drive a quest for some form of constituted organized whole. A third level pertains to the (perceived) universal nature of an international system, expressing the conviction that it is possible and even desirable to establish a legal order at an international or global scale, a "common legal order for mankind as a whole".

The first level of Simma's scheme corresponds to universality as a common core where pluralism consists of legal systems gravitating around a common core (planet-metaphor). Simma's second level corresponds to universality as a shared belief of functioning within a larger legal system where pluralism consists of legal systems that are connected in an interjudicial dialogue (island-metaphor). The third level may be seen as a combination of the two forms of universality, where a belief in universal values reinforces the pull for further integration and the erosion of normative differences.

We can translate Simma's strata or layers of universality to the subsystem of ICL. In ICL, the common core consists of a number of (*ius cogens*) norms, e.g. crime definitions (genocide and grave breaches of international humanitarian law) and non-derogable human rights/due process norms (presumption of innocence, prohibition of torture). The second level of universality consists of cross-fertilization and judicial dialogue between international tribunals *inter se* and between domestic judges and international judges, with the former seeking guidance by the latter. The third level pertains to the quest for a comprehensive and unified international criminal law, a general part of ICL.

### Need for a General Part?

It has been argued, mainly by criminal law scholars coming from the civil law tradition, that there is need for a 'general part' in international criminal law. It is felt that in order to be coherent international criminal law must consist, not only of a special part, which contains the definitions of international crimes, but also of a general part on aspects of *mens rea*, modalities of criminal responsibility, and justifications and excuses.

Greenawalt criticizes this quest for a general part of ICL. Not merely because, he thinks it unfeasible, more so because he finds it wrong in principle. He argues that the drive towards unification and consistency at the international level creates fracture and inconsistency at the national level, which can threaten the integrity of a state's criminal justice system. The creation of a distinct system of ICL may cause a state to adopt liability principles that are inconsistent with those otherwise applied.<sup>34</sup> A uniform code of ICL could cause pluralism at the national level.

And here we encounter a question that shimmers through the debate on pluralism and universality: are international crimes fundamentally different from

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<sup>33</sup> Simma, *supra* footnote 8, 266-268.

<sup>34</sup> That this is a real risk can be taken from the *Van Anraat* case in The Netherlands: Judgement, *Van Anraat*, Hague District Court, Case No. LJN: AU8685, 23 December 2005; Judgement, *Van Anraat*, Hague Court of Appeals, Case No. LJN: BA4676, ILDC (International Law in Domestic Courts) 753 (NL 2007), 9 May 2007, at 7. See H.G. van der Wilt, 'Genocide v. War Crimes in the *Van Anraat* Appeal', 6 *JICJ* (2009), 557-567;

ordinary crimes? Does international criminality qualify as *sui generis* and hence require the existence of its own general part, generating a two-track system of adjudication at the national level: one for domestic/ordinary crimes and one for international crimes? Greenawalt examines the alleged international/*sui generis* nature of ICL and the arguments that are relied upon to justify the development of a general part of ICL.<sup>35</sup> He discusses justifications rooted in international relations, gravity considerations, and enforcement concerns. None of these considerations persuade him to accept a general part of ICL to the detriment of domestic law.

Unlike Greenawalt, I would argue in favour of developing a uniform, or at least harmonized, core of substantive international criminal law. Accepting pluralism at the national level does not disqualify the need for a general part at the *international* level. Substantive international criminal law is under-theorized and lacks a common 'grammar'. Moreover, certain liability theories have developed as genuine, *sui generis* international liability theories (JCE, command responsibility) that could be implemented at the national level along-side local law that traditionally forms part of the domestic general part (complicity liability, defences, sentencing). Developing an international general part will contribute towards a more sophisticated substantive international criminal law, especially when drawn on (general) principles of time-honoured domestic criminal law. In doing so, one must adopt a harmonizing approach. By looking beyond labels and concepts differences may be minimized to allow for developing an international theory of attribution. Such an approach may have an added value in that it stays the current trend of *Alleingang* at the international level.

## Managing Pluralism

Having argued that pluralism is not something to counter but rather to manage, we turn to the mechanisms that have been identified to deal with legal pluralism. Berman surveys a series of mechanisms, institutions and practices that are used to accommodate and manage legal pluralism. They are, i) dialectical legal dialogue (ii) margins of appreciation (iii) limited autonomy regimes (iv) subsidiarity schemes (v) jurisdictional redundancies (multiple and overlapping jurisdictional assertions reinforcing a particular claim), (vi) hybrid participation arrangements (vii) mutual recognition schemes (viii) safe harbour agreements and (ix) a pluralist approach to conflict of laws. A discussion of all nine mechanisms would go beyond the ambit of this editorial. I wish to make only a few observations.

Two ICL 'phenomena' are expressly mentioned in Berman's scheme: hybrid adjudication/participation (under vi) and complementarity (under v). Hybrid participation has a long history and goes back to the 12<sup>th</sup> century and the English custom of using mixed juries with members of different communities accommodating regional differences.<sup>36</sup> The SCSL and other hybrid courts like the ECCC exemplify pluralism; they are an expression of the belief that not one set of norms applies to the crimes committed in Sierra Leone and Cambodia respectively.

Complementarity is grouped under Berman's category of jurisdictional redundancies:

Complementarity regimes are a more formalized way of harnessing the potential power of jurisdictional redundancy. Here the idea is that when two legal communities claim jurisdiction over an actor, one community agrees not to assert jurisdiction, but only so long as the other community

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<sup>35</sup> See *supra* footnote 11, 21-37

<sup>36</sup> Berman, *supra* footnote 30, at 1218-1219

takes action. This is a hybrid mechanism because one community does not hierarchically impose a solution on the other, but it does assert influence on the other's domestic process through its mere presence as a potential jurisdictional actor in the future. (...)

The best-known complementarity regime in the world today is the one enshrined in the statute of the International Criminal Court ("ICC").<sup>37</sup>

In this context, complementarity encompasses the belief that there is not one legal framework that applies to international crimes.<sup>38</sup> This is an interesting observation when we bear in mind that complementarity has also been perceived as pushing for exactly the opposite: uniformity.

Berman's scheme further refers to judicial dialogue as a mechanism to manage pluralism (under i)). Indeed, this is one of the most important 'tools' to stay fragmentation and it has been recognized as such by legal scholars in the field.<sup>39</sup>

An interesting and possibly useful mechanism of pluralism-management in Berman's list is the category of 'safe harbour agreements', which partly overlaps with mechanism (ii) margins of appreciation.

Instead of full harmonization of norms, safe harbour principles require that firms doing business abroad abide by some, though not all, of the standards of that foreign community. In return, the foreign community agrees not to impose further regulatory burdens.<sup>40</sup>

Translated to ICL this would mean that domestic courts, when acting as international law enforcers, can rely on their domestic general part when adjudicating international crimes. For the interpretation of crime definitions and a limited number of *sui generis* liability theories, however, they should apply international norms. It is only the general part that remains in the domestic sphere.

A tool, mentioned earlier in the context of the quest for a general part, that is not mentioned in Berman's list of pluralism-management, is harmonization. In Berman's paper harmonization belongs to the universalist pole rather than to the realm of pluralism. This betrays a somewhat 'negative' view of pluralism. Viewed in a more positive light: pluralism as an asset that strengthens rather than weakens the international criminal justice system, accepts some form of harmonization. Bearing in mind how pluralism and universality belong together and retaining ICL's balance between universality and fragmentation, requires in my view that a common core of substantive law is harmonized.

This brings me back to Greenawalt who concludes his paper on pluralism by characterizing ICL as a four-tier system rather than a single universal code.<sup>41</sup> He distinguishes between (1) universally binding law (2) tribunal-specific law (3) restraints on domestic law (4) default law. Every tier or category of law comes with its own gradation of pluralism (in the sense of more or less pluralism) and hence constitutes a way to manage pluralism.

In Greenawalt's four-tier system we recognize some of the above-mentioned pluralism-management tools, most notably the safe harbour agreements and margins

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<sup>37</sup> Berman, *supra* footnote 30, at 1215.

<sup>38</sup> Consider also Art. 10 ICC Statute: Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

<sup>39</sup> Burke-White, *supra* footnote 25, at 971-973; See also W.W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement', 24 *Mich J Int'l L* 1 (2002); See A-M. Slaughter, *A New World Order* (2004), 250; A-M. Slaughter, 'Judicial Globalization', 40 *Va. J. Int'l L* 1103, 1105-1116.

<sup>40</sup> Berman, *supra* footnote 30, at 1228.

<sup>41</sup> Greenawalt, *supra* footnote 11, 59-66.



of appreciation. The first tier of ICL contains ‘hard’ rules that are universal in application, e.g. crime definitions. The second tier relates to so-called forum-specific norms, e.g. distinct rules of procedure and evidence. The third category of ICL concerns the general part of domestic law where ICL, rather than imposing a single uniform approach, allows and constrains a “margin of state discretion to apply local law to the prosecution of ICL offences”.<sup>42</sup> The fourth tier consists of ‘default ICL’ in case there is no appropriate or available domestic law to apply. Taken together the four tiers allow for legal pluralism with the 2<sup>nd</sup> and 3<sup>rd</sup> tier expressly allowing for pluralism at both the international and domestic level. Universality is found in the core of universally binding law. Greenawalt’s four-tier system is a first attempt to comprehensively deal with pluralism in substantive ICL.

Pluralism in ICL is a topic that warrants further research and debate, by both scholars and legal practitioners. With the growing density and activity of ICL, legal pluralism will only become more prominent. This Journal has accommodated the debate on fragmentation and pluralism in international law from the very beginning. We look forward to accommodate and further this debate in the realm of ICL.

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<sup>42</sup> Greenawalt, *supra* footnote 11, at 61.